NO. 29440

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI`I

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|---|---|
| KAUAI SPRINGS, INC.,<br><br>Plaintiff-Appellant/Appellee,<br><br>vs.<br><br>PLANNING COMMISSION OF THE COUNTY OF KAUA`I,<br><br>Defendant-Appellee/Appellant. | Civil No. 07-1-0042<br>(Other Non-Vehicle Tort)<br><br>APPEAL FROM THE SEPTEMBER 23, 2008 FINAL JUDGMENT ON THE COURT'S SEPTEMBER 17, 2008 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER REVERSING IN PART AND VACATING IN PART APPELLEE PLANNING COMMISSION OF THE COUNTY OF KAUA`I PLANNING COMMISSION'S FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER RE: USE PERMIT U-2007-1, SPECIAL PERMIT SP 2007-1, AND CLASS IV ZONING PERMIT Z-IV-2007-1 (DATED JANUARY 23, 2007)<br><br>FIFTH CIRCUIT COURT<br><br>HONORABLE KATHLEEN N.A. WATANABE |

APPELLANT PLANNING COMMISSION
OF THE COUNTY OF KAUA`I'S OPENING BRIEF

APPENDICES "A" – "C"

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APPELLANT PLANNING COMMISSION
OF THE COUNTY OF KAUA'I'S OPENING BRIEF

## I. INTRODUCTION

Appellant Planning Commission of the County of Kaua'i ("Planning Commission"), by and through its attorneys, McCorriston Miller Mukai MacKinnon LLP, hereby respectfully submits this Opening Brief in this appeal from the Fifth Circuit Court's Findings of Fact, Conclusions of Law, and Order Reversing in Part and Vacating in Part the Planning Commission's Findings of Fact, Conclusions of Law, Decision and Order re: Use Permit U-2007-1, Special Permit SP 2007-1, and Class IV Zoning Permit Z-IV-2007-1 (dated January 23, 2007), filed on September 17, 2008 ("September 17, 2008, Decision and Order"), and Final Judgment, filed on September 23, 2008. See Appendices "A" and "B" hereto, Record on Appeal ("ROA") V.2 at 166-191 and 192-195. The Planning Commission seeks reversal of the Circuit Court's Order and Final Judgment in favor of Appellee Kauai Springs, Inc. ("Appellee"), which were based on erroneous findings of fact and conclusions of law.

In this case the Court must decide whether a county agency may deny land-use permits for an activity involving the commercial exploitation of an unregulated ground-water resource, when the permit applicant fails to establish a legal right to remove and distribute waters subject to the public trust. Appellee, an ambitious water-bottling company with big aspirations to profit from Kaua'i's limited fresh-water resources, is attempting to circumvent the constitutional, statutory and common-law requirements standing in its way.

After years of operating its water-bottling facility without the proper land-use permits, Appellee reluctantly applied for the required permits but failed to provide evidence that its commercialization of the water was legal and non-detrimental to the general welfare. During the hearings process, the Planning Commission became aware that the public trust doctrine imposes a duty upon all political subdivisions of Hawai'i to protect unregulated water resources from unlawful and adverse exploitation. The Planning Commission attempted to reconcile its duty to both evaluate Appellee's land-use application and protect Hawai'i's water resources by seeking input from other State agencies tasked with water regulation. After carefully evaluating Appellee's application, the Planning Commission concluded that Appellee failed to meet its burden of proof that the use of water was legal. Therefore, the Planning Commission denied the

permits.

The Circuit Court accepted Appellee's argument that the Planning Commission exceeded its authority by investigating the use of water—instead of simply ignoring it. In doing so, the Circuit Court also upheld the notion, abandoned almost forty years ago in this State, that water resources can be privatized and commercially exploited with little or no regard for the public's interest. To remedy the Planning Commission's "transgression," the Circuit Court declared two of the permits automatically approved pursuant to Section 91-13.5, Hawai`i Revised Statutes ("HRS"), and ordered a third permit granted without further deliberation. Under the Circuit Court's restrictive interpretation of the automatic approval provisions, an applicant like Appellee can obtain county permits by simply failing to present the required evidence and then pretending to cooperate until the deadlines expire.

For the reasons set forth below, the Court of Appeals should reverse the Circuit Court's September 17, 2008, Decision and Order and uphold the Planning Commission's proper and legally-founded decision to deny Appellee's permits.

## II. STATEMENT OF THE CASE

### A. Factual Summary

#### 1. Appellee operated a water bottling facility for several years without obtaining the required zoning permits.

Appellee operates a water processing, bottling, and distribution facility on property located in Koloa, Kaua`i. Administrative Record of the proceedings before the Kaua`i Planning Commission, numbered 000001 to 000684 ("KPC"), at 605-607. The majority of the property is designated "Agriculture District (A)" by the Kaua`i General Plan with a portion zoned "Open District (O)." KPC at 605-607. Makana Properties, LLC leased the property to Appellee for a period of fifteen years. ROA V.2 at 168 ¶ 4; KPC at 246. Before relocating to Kaua`i, Appellee's owners operated a bottled water company in the State of Alaska. KPC at 219.

The water used by Appellee originates as spring water from a cave on Kahili Mountain, several miles away. KPC at 450-451, 605-607. EAK Knudsen Trust ("Knudsen Trust") purportedly owns the cave. KPC at 261-262. The water is transported to the subject property by a gravity-fed system owned by Grove Farm Company ("Grove Farm"). KPC at 241. The system was formerly used to irrigate the Koloa ahupua`a, KPC at 261-262, and presently serves fifty to sixty customers including Appellee. KPC at 415. The water reaches Appellee's bottling facility

by tapping into an eight-inch pipe crossing the subject property. KPC at 605. Following extraction from the supply line, the water is purified using ozone, bottled into five gallon containers, and shipped to customers. KPC at 242, 606.

In 2003, Appellee applied for, and was granted, a Class IV Zoning Permit (Z-912-03) and a Building Permit (#03-709) to erect a "watershed" on the property. KPC at 476-478. The County Planner, who was originally assigned to process the application, noted that the watershed "looked . . . like any other ag. building at the time." KPC at 246. However, the "watershed" was actually a semi-automated water-bottling facility capable of filling at least 1,000 five-gallon bottles per day. KPC at 242-243.

Appellee bottled and sold water for over two years without seeking any other land-use permits. KPC at 245. Under Kaua`i's Comprehensive Zoning Ordinance ("CZO") and Hawai`i law, industrial processing and packaging of this nature is generally not permitted in Agricultural and Open Districts. HRS § 205-4.5 (2006); Kaua`i County Code ("KCC") §§ 8-7.2, 8-8.2 (1987); ROA V.2 at 46-47 (Zoning Compliance Notice (May 15, 2006)). Appellee claimed bottled water was an "agricultural product," and that bottling was a proper use of "agricultural land." KPC at 245. The CZO defines "agriculture" as the "processing of any *animal or plant organism* . . . ." KCC § 8-1.5 (emphasis added). The Planning Commission found that Appellee was required to obtain a Use Permit, Special Permit, and Class IV Zoning Permit for the proposed use of land. KPC at 342 ¶ 5; see also HRS § 205-6(a); KCC §§ 8-7.7(4), 8-8.7, 8-19.1, 8-19.6, 8-20.1, 8-20.2.

**2. Appellee sought after-the-fact permits.**

On May 15, 2006, the Kaua`i Planning Department ("Planning Department") issued a cease and desist letter to lessor Makana Properties, LLC. ROA V.2 at 46-47 (Zoning Compliance Notice (May 15, 2006)). The letter stated that violations were found, including "processing and packaging without the proper permits" and "[i]ndustrial processing and packaging" in an Agricultural District. ROA V.2 at 46. Acknowledging that the permits were necessary "for the purpose of harvesting and packaging spring water in the Agricultural District[,]" Appellee applied for three permits on July 5, 2006: (1) Use Permit U-2007-1; (2) Special Permit SP-2007-1; and (3) Class IV Zoning Permit Z-IV-2007. KPC at 657 (Application) ¶ 4, 682 (Planning Department Intake Form).

Appellee initially sought to greatly expand its "harvesting" and marketing of spring water. At public hearings subsequently held before the Planning Commission, Appellee explained that it wanted the permits to cover an approximate *fourteen-fold increase* in the harvesting of water (from 2,500 gallons per week to 35,000 gallons per week).

> Staff (Barbara Pendragon): Couple of questions please, Jim, can you tell us how many 5 gallon bottles you are filling weekly and delivering weekly now?
>
> Mr. Satterfield: Between 3 and 5 hundred.
>
> . . .
>
> Mr. Satterfield: You spend a lot of time there when you own your own business and are just starting but the workers are part-time right now. Our volume capacity is 1,000 bottles a day and we are now at approximately 3 to 5 hundred a week so that clarifies that I hope a little bit.
>
> . . .
>
> Staff (Barbara Pendragon): So to do 1,000 bottles a day is what you are asking?
>
> Mr. Satterfield: Yes.
>
> . . .
>
> Staff (Barbara Pendragon): I guess 7 days a week.
>
> Mr. Satterfield: Yes 7 days a week, as many hours as you will allow us, as Council will allow us to be there. I would even work the graveyard shift its cooler.

KPC at 241-242. The request also sought no restrictions on the size of bottles and an increase from two to ten delivery vans. KPC at 214, 219.

When questioned about his intentions to expand bottling operations, Appellee's owner responded that "there is no limit on how much water [we] can extract . . . ."

> Mr. Costa (Planning Director): So is there a limit to how much you can extract from the system?
>
> Mr. Satterfield: No. At this point there is no limit to how much I can extract that I know of in any document that we have written out.

KPC at 241. Appellee alluded to a plan to export water once market conditions were favorable.

> Staff (Barbara Pendragon): How many trucks a day would be required to deliver 1,000 because you are not taking [smaller bottles] to Kaua`i it would be to some place to the harbor to ship off island.
>
> Mr. Satterfield: No. *We do not intend on shipping off island* until Kaua`i has adequate water. We are against exporting the water *until we have saturated the island.*

KPC at 251 (emphasis added). The Circuit Court correctly found that Appellee intended to "expand . . . to include bottling water in smaller bottles for wider distribution." ROA V.2 at 170 ¶ 18.

### 3. The Planning Commission became aware that it had an affirmative duty under the public trust doctrine to investigate Appellee's water use.

During the public hearings on Appellee's application, the Planning Commission became aware that the evaluation of Appellee's use of land should be different than it was in 2003 when the Building and Class IV Zoning Permits were granted. Both the public and the deputy county attorney explained that the Planning Commission could no longer ignore commercial exploitation of so-called "private" waters affecting the public trust.

> Mr. Imai Aiu (Commissioner): I . . . too have my concerns about basically taking the water and bottling it for profit . . . where basically water rights have come into play like this and does someone indeed have the right to take. . . . [I]s it public or is it private and do they have those rights?
>
> . . .
>
> Mr. Mike Matsukawa (Deputy County Attorney): *About 2 months ago the Hawai'i Supreme Court rendered a decision on the Public Trust Doctrine emanating from the 78 Constitutional Amendments. Court was looking at the narrow issue of water and the Public's Trust responsibility that the County as a political subdivision of the State has. In other words prior to 2 months ago there was this fragmentation where people would think well the state is the trustee of the Public Trust so therefore these trust issues we refer to the State. And there is no real final law in the State, it's evolving as we speak and so what the court said is that the County agencies like this Commission its self [sic] shares in that responsibility, a trust responsibility to answer the question that you raise.*
>
> Mr. Imai Aiu (Commissioner): So I get to answer my own question.
>
> Mr. Mike Matsukawa (Deputy County Attorney): Or to conduct your own investigation if you are unsatisfied with the State's lack of response or sufficiency of the response. . . . You may have to study it yourself.
>
> . . .
>
> Mr. Matsukawa (Deputy County Attorney): And . . . *the Counties as political subdivision[s] or sort of agents of the State bear some of that responsibility as a public trustee*. Because what was happening I guess in several years past was with the fragmentation of regulatory authority it was common for the State to say that's not our job that's for the County or for the County to say that's not our job that's [for] the State.

KPC at 230-232 (emphasis added).

Appellee's permit application illustrates that Appellee was initially aware that water use was a sensitive issue, and subject to evolving law in Hawai`i.

> We are proceeding with extreme caution knowing that this is new and uncharted ground. Trying to define boundaries and ways to work with the community is our desire *in a very gray and dimly lit regulated area.*

KPC at 661 ¶ 5 (emphasis added).

While acknowledging that land use was its responsibility, the Planning Commission struggled to reconcile its duties as applied to Appellee's use of fresh water. KPC at 183-185. The issue was whether the agency should ignore a potentially illicit use of public trust waters and "approve the land based activity [even if doing so] directly suggests or approves the transport and consumption of the water." KPC at 184 (Comments of Mr. Matsukawa, Nov. 28, 2006, Hearing).

In fact, Appellee later admitted that it never investigated the issue of water rights vis-à-vis its use of purportedly private water. KPC at 134-135. Moreover, Appellee presented no concrete evidence that its activities and proposed use of water were not detrimental to its neighbors, the community, or the environment.

### 4. The Planning Commission sought information about the volume and impact of Appellee's existing and proposed use of water.

Appellee's application included a supplemental document attempting to explain how its operations and use of water met the requirements for Use and Special Permits. KPC at 657-661. While mentioning that "the process of bottling water has minimal impact on the land and the surrounding areas[,]" and that "[t]here is *currently* excess water in the system[,]" these bare conclusions were presented with no evidence that the water use is legal or that the proposed fourteen-fold increase would carry no adverse consequences.[1] KPC at 658 ¶¶ 3, 5 (emphasis added). Instead, the application inappropriately focuses on the quality and taste of the water, as well as its availability in the event of a natural disaster. KPC at 659, 661 ¶ 6.

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[1] In justifying the granting of a Use Permit, Appellee made the following conclusory statement without any supporting evidence: "[T]he establishment, maintenance and operation of the Kauai Springs spring water harvesting and bottling operation is compatible with, and not detrimental to the health, safety, peace, morals, comfort and general welfare of persons residing, or working, in the neighborhood of the proposed use. The proposed use will not cause any substantial harmful environmental consequences on the land or surrounding lands." KPC at 659.

During the public hearings, the Planning Commission sought more information about the volume and impact of Appellee's present and proposed water use. At the August 8, 2006, public hearing, the Knudsen Trust admitted that it did not know exactly how much water was supplied from the system, but speculated that it was roughly in excess of five million gallons per day. KPC at 263. No evidence of any measurement or calculation was presented. When questioned about the effect of its water use on other users, Appellee claimed that the spring emits 275,000 gallons per day. KPC at 221 (Sept. 26, 2006, Hearing). Again, no evidence of any measurement or calculation was presented.

**5. The Planning Commission consulted with the public and other state agencies.**

In public testimony, attendees raised concerns about the large-scale commercialization of public-trust waters. KPC at 207 (testimony of Ms. Elaine Dunbar) (discussing the sale of Appellee's rights to multi-national corporations). One participant commented that "there is no policy regarding the sale of water in this fashion. When the water code was written this use was not foreseen." KPC at 141 (testimony of Ms. Makaala Kaaumoana). The Office of Hawaiian Affairs asked the Planning Commission to withhold the permits "until the applicant can show, and the appropriate agencies can concur, that Kaua'i Springs' proposed use is reasonable-beneficial and will not interfere with public trust purposes." KPC at 349 (Letter from Clyde Nāmu'o to Randall Nishimura (Nov. 30, 2006)).

The Planning Commission sought input from numerous State and local agencies,[2] including the Commission on Water Resource Management ("CWRM"). KPC at 674. CWRM's evaluation of Appellee's application was particularly relevant because this agency is the primary regulator of water in Hawai`i. See HRS § 174C-5 (2006). CWRM declined to exert jurisdiction over Appellee because Kaua`i was not designated as a ground-water management area, but warned that Appellee's use of the water could affect stream flows requiring an instream flow permit.

> 8. Ground-water withdrawals from this project may affect streamflows, which may require an instream flow standard amendment.
>
> . . .

[2] The agencies contacted included the: Engineering Division, Water Department, State Health Department, State Historical Preservation Division, State Land Use Commission, State Office of Planning, State Department of Agriculture and the Commission on Water Resources. KPC at 674.

> The island of Kauai has not been designated as a ground-water management area; therefore, a water use permit from the Commission is not required to use the existing source(s) or to change the type of water use.

KPC at 411 (Letter from Dean A. Nakano to Ian K. Costa (Sept. 26, 2006)). The Planning Commission was unsure from this response whether Appellee, or CWRM itself, was responsible for determining necessity and compliance with the instream flow requirements. KPC at 225-226 (comments of Mr. Aiu and Staff (Barbara Pendragon)).

On November 6, 2006, the Planning Director wrote to CWRM seeking clarification of the conditions under which CWRM would *not* require a permit from Appellee. One of the three conditions stated that "[t]he tunnel is not being changed, and *the Applicant's use of the water is not affecting the source in any way (i.e. not inducing more water to come out of the source or tunnel).*" KPC at 408 (Letter from Ian K. Costa to Dean A. Nakano (Nov. 6, 2006)) (emphasis added). The letter requested CWRM to "advise if you concur with the foregoing [conditions], and *if pursuant to those conditions, no permit is required from the [CWRM].*" KPC at 409 (emphasis added). While concurring with the conditions, CWRM's response did not address whether those conditions were satisfied and failed to conclude that no permits were required.

> We concur with your summary of our comments and confirm that no permits from the Commission are required for the proposed use of water *under the three conditions outlined in your letter.*

KPC at 407 (Letter from Dean A. Nakano to Ian K. Costa (Nov. 20, 2006)) (emphasis added). Moreover, the letter did not address which agency should determine whether those conditions were satisfied.

The Planning Commission also sought the regulatory involvement and expertise of the Public Utilities Commission ("PUC"). The Planning Director asked the PUC to determine "whether the Grove Farm water system or the Applicant's sale of water from the system is subject to regulation by [PUC]." KPC at 459 (Letter from Ian K. Costa to PUC (Nov. 6, 2006)). The PUC responded that "it does not *appear* that Kauai Springs would be a public utility subject to commission jurisdiction." KPC at 418 (Letter from Stacey Kawasaki Djou to Ian K. Costa (Nov. 22, 2006)) (emphasis added). The letter warned, however, that this opinion was informal and non-binding, limited by the facts provided, and subject to change based on evolving law in Hawai`i. KPC at 418. The letter also stated that "*[b]ased on the . . . limited information provided*, there is a possibility that Grove Farm may be operating as a public utility" subject to

regulation. KPC at 417 (emphasis added). Whether PUC regulation applied was determined, in part, by "the amount of control, if any, [Appellee] may be able to exert over Grove Farm's water system and operations." KPC at 417.

### 6. Uncertainties about the scope and impact of Appellee's proposed use of water complicated the Planning Commission's evaluation.

The Planning Commission's evaluation was complicated by Appellee's often unclear and contradictory representations. See, e.g., KPC at 560 (Staff Report for the Sept. 26, 2006, Hearing) ("The Applicant was also asked to define what it wanted more clearly."). For example, although Appellee initially sought permission to bottle 35,000 gallons per week, four months into the process it changed that amount to 7,000 gallons per week.

> I think with Barbara [Pendragon] there was some discussion of growth and the fact that his business may grow and we are not seeking any sort of growth. We agree that that is not appropriate at this time. So what we are asking for is permission to bottle 1,000 gallons of water a day.

KPC at 197 (Comments of Harvey Cohen, Esq., counsel for Appellee, Nov. 14, 2006, Hearing). Appellee's owner ("Mr. Satterfield") confirmed his wish to amend the original application—thereby limiting the bottling and transportation of water.

> Mr. Satterfield: 1,000 gallons a day is what we are asking to amend it to.
>
> Staff (Barbara Pendragon): That is 2 vans?
>
> Mr. Satterfield: Yes.
>
> Staff (Barbara Pendragon): Its 2 vans not 10 vans which had been asked for at a previous meeting so this is an amendment of that request?
>
> Mr. Satterfield: Correct.

KPC at 214; KPC at 438-439 (summarizing Appellee's amendment of application).

At a subsequent meeting, however, Appellee reversed itself and again sought a fourteen-fold increase in capacity. KPC at 170. As late as the November 14 and 28, 2006, hearings, Committee members were still uncertain about the number of hours Appellee intended to operate its facility on a daily basis and whether the water Appellee used was subject to chlorination. KPC at 170-171, 173, 210-213.

### 7. The Planning Commission denied all three permits because outstanding issues remained unresolved after 203 days.

In total, the Planning Department's evaluation of Appellee's application continued for 203 days. Delays and continuances were necessary to account for: (1) five hearings wherein

numerous unexpected issues arose, KPC at 1-264; (2) time-consuming consultations with various agencies, including correspondence with CWRM and PUC continuing into late-November 2006, KPC at 438; (3) attempts to schedule a field trip to the water source, which were ultimately thwarted when Knudsen Trust refused to admit the public,[3] KPC at 450; (4) efforts to reconcile uncertainties, inconsistencies and changes relating to Appellee's application, see, e.g., KPC at 170-171, 173, 197, 210-213, 214; and (5) the inability or reluctance on the part of Appellee and other agencies to address outstanding issues, KPC at 344 ¶ 18.[4]

Throughout this period, Appellee continued to attend and participate in meetings, amend and re-amend its application, and negotiate with the Planning Commission regarding the nature of any approved permits. For instance, the Planning Commission considered granting conditional permits allowing Appellee to independently provide evidence of compliance with zoning and public trust requirements. On November 28, 2006, Appellee agreed to accept a conditional Use Permit so that the Planning Commission could review any subsequent change of ownership.

> Mr. Weinstein: So if we grant the permit, status reports [could be furnished] to see how it is affecting everything.
>
> Chair (Randall Nishimura): Yes. I would ask in light of public comment whether you would be willing to accept the restriction on the Use Permit that it would be for the use of the applicant only, it's not transferable and that should you sell the business that the Commission would have the right to review the Use Permit?
>
> Mr. Cohen: Yes.

KPC at 175.

Appellee also agreed to a "conditioned approval, conditioned on clarifying some of these water right issues." KPC at 134 (Comments of Harvey Cohen, Esq.). Under this proposal, Appellee would be required to obtain a declaratory ruling from CWRM (and perhaps PUC) on water rights and usage—thereby fulfilling the Planning Commission's duty to the public trust.

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[3] "The Planning Commission approved a motion to take a field trip to the tunnel site and to the bottling facility sometime between October 25 and October 31, 2006. However, due to sunshine law concerns relative to the tunnel landowner's restriction of public access to the site, and due to trail conditions, the site visit was not scheduled." KPC at 450.

[4] "The delay in reaching a decision on this proceeding was attributed to staff's effort in obtaining additional information relating to the Applicant's authority and right to obtain and extract water for commercial purposes." KPC at 344 ¶ 18.

> Chair (Randall Nishimura): Yes the suggestion that I had was to ask for a declaratory ruling in which case they [, an appropriate agency,] would have to consider the facts and that declaratory ruling be incorporated or it's possible that the other option is that you could condition to permits.

KPC at 186.

On January 23, 2007, with no time remaining to debate satisfactory conditions, the Planning Commission voted to deny all three permits and issued its Findings of Fact, Conclusions of Law, Decision and Order. KPC at 71, 72; see Appendix "C" hereto, KPC at 342-347 ("January 23, 2007, Decision and Order"). The reason for the denial was the Planning Commission's conclusion that Appellee failed to carry its burden of proving "that all applicable requirements and regulatory processes relating to water rights, usage, and sale are satisfactorily complied with . . . ." KPC at 346 ¶ 3. The Planning Commission also based its decision on the fact that Appellee made no attempt to investigate water rights from the beginning. KPC at 134-135.

At the February 13, 2007, hearing addressing Appellee's request for reconsideration, Appellee's counsel offered to waive the automatic-approval deadlines to permit more time to obtain declaratory rulings.

> Mr. Harvey Cohen: Again we were willing to put all sorts of conditions and I know you have a long docket ahead of you. . . . I don't see any downside in continuing this matter until we are certain and you gentlemen are certain that [Appellee] is indeed operating outside the limits of the law.
>
> . . .
>
> Mr. Harvey Cohen: The applicant would certainly be willing to waive something to avoid a hasty decision that's why I believe we are in this box to begin with. . . . But absolutely we would be willing to execute a document, I'm happy to work with the County Attorney, a waiver of our rights.

KPC at 2, 4. The Planning Commission voted to deny reconsideration, in part, on the ground that it was not known how long a declaratory ruling would require, and too much time had already elapsed. KPC at 16-17.

### B. Procedural Background

On February 15, 2007, the Planning Commission denied Appellee's request for reconsideration. KPC at 329 (Letter from Ian K. Costa to James Satterfield (Feb. 15, 2007)). On March 13, 2007, the Planning Department ordered lessor Makana Properties LLC to cease and desist Appellee's illegal bottling operation within fifteen days. KPC at 324-326 (Notice of

Violation (March 13, 2007)). On or about March 15, 2007, Appellee filed an appeal pursuant to Chapter 91, HRS. ROA V.1 at 1-10. On April 5, 2007, the Planning Department denied Appellee's request to continue its operations during the appeal. KPC at 320 (Letter from Bryan Mamaclay to Harvey L. Cohen (April 4, 2007)). On May 15, 2007, the Circuit Court entered an Order Granting Motion for Preliminary Injunction. ROA V.1 at 229-231. On September 17, 2008, the Circuit Court entered its Findings of Fact, Conclusions of Law, and Order Reversing in Part and Vacating in Part Appellee Planning Commission of the County of Kaua'i's Planning Commission's Findings of Fact, Conclusions of Law, Decision and Order Re: Use Permit U-2007-1, Special Permit SP 2007-1, and Class IV Zoning Permit Z-IV-2007-1 (dated January 23, 2007) ("September 17, 2008, Decision and Order"). ROA V.2 at 166-191. The Order declared Appellee's application for Use Permit and for Class IV Zoning Permit approved, and ordered the Planning Department to issue the permits forthwith. ROA V.2 at 190 ¶ 1. The Order also remanded Appellee's application for the Special Permit back to the Planning Commission with an order to issue it to Appellee immediately. ROA V.2 at 191 ¶ 2. Finally, the Order permanently enjoined the Planning Commission from enforcing its January 23, 2007, Decision and Order and taking any actions that would be contrary to the issuance of the three permits. ROA V.2 at 191 ¶ 4.

## III. POINTS OF ERROR

A. The Circuit Court erred in implicitly holding in its Conclusions of Law that the Planning Commission had no duty under the public trust doctrine to consider Appellee's water use. In its September 17, 2008, Decision and Order, the Circuit Court held:

> 71. The Planning Commission did not identify any other outstanding regulatory processes that it claimed must have been fulfilled in order to satisfy any duty under the public trust that it *may* have had.
>
> 72. There is nothing in the Record of this case to show that the Planning Commission did not fulfill any duty it *may* have under the public trust.

ROA V.2 at 189 (emphasis added). The Planning Commission raised and argued this issue at ROA V.2 at 90-93, 100-101 and at the hearing before the Circuit Court. See Transcript of Proceedings before the Honorable Kathleen N.A. Watanabe (August 20, 2008) ("Transcript"), at 20:2-6.

B. The Circuit Court erred in concluding as a matter of law that the administrative record lacks any evidence that Appellee's existing or proposed uses of water taken from the

Kahili Mountain ground-water source might affect resources subject to the public trust. In its September 17, 2008, Decision and Order, the Circuit Court held:

> 63. Decisions on permit applications must be grounded in fact and the Record, not speculation, and the Record in this case is devoid of any evidence that Kauai Springs['] existing or proposed use might affect water resources subject to the public trust.

ROA V.2 at 188. The Planning Commission raised and argued this issue at ROA V.2 at 91-92, 95-96, 104 and at the hearing before the Circuit Court. See Transcript at 19:8-23.

C. The Circuit Court erred in implicitly holding in its Conclusions of Law that, by requiring Appellee to prove the legality of its commercialization of fresh-water resources, the Planning Commission failed to consider the proper criteria for zoning permits. In its September 17, 2008, Decision and Order, the Circuit Court held:

> 41. The Planning Commission did not consider the proper criteria when reviewing and processing Kauai Springs' zoning permit applications. The applicable standards for whether Use, Special, and Class IV permits should be issued are clearly established.
>
> . . .
>
> 59. The Decision and Order contains no finding, and there is no evidence in the Record, that Kauai Springs did not meet the criteria for issuing the three permits at issue in this appeal.
>
> . . .
>
> 73. *If Kauai Springs bore the burden of proof that its proposed use did "not violate any applicable law administered by CWRM, the PUC or any other applicable regulatory agency,"* Kauai Springs plainly carried that burden of proof. Both of these agencies had provided their input to the Planning Commission, and neither agency had any substantial concerns with Kauai Springs, as reflected in the Decision and Order.
>
> . . .
>
> 75. Conclusions of Law #3 and #4 . . . are wrong.

ROA V.2 at 184, 188, 190 (emphasis added). The Planning Commission's Conclusion of Law No. 3 states, in part:

> 3. In view of the comments received from CWRM and PUC the land use permit process should insure that all applicable requirements and regulatory processes relating to water rights, usage, and sale are satisfactorily complied with prior to taking action on the subject permits. *The Applicant, as a party to this proceeding should also carry the burden of proof that the proposed use and sale of the water does not violate any applicable law administered by CWRM, and PUC or any other applicable regulatory agency.*

KPC at 346 (emphasis added). The Planning Commission raised and argued these issues at ROA V.2 at 92-105 and at the hearing before the Circuit Court. See Transcript at 20:7-25, 21:1-17.

D. The Circuit Court erred in concluding as a matter of law that Appellee carried its burden of proof by presenting sufficient evidence that its proposed use of fresh-water resources was legal under Hawai`i law. In its September 17, 2008, Decision and Order, the Circuit Court found as a matter of fact that:

> 54. The Decision and Order stated the Water Commission informed the Planning Commission that Kauai Springs required "no permits" *because* "the Applicant's use of the water is not affecting the source in any way (i.e., not inducing more water to come out of the source or tunnel)," "the existing source has been registered and is basically grandfathered, and there is an agreement between the new user (Applicant) and the operator of the system," and "there is a closed line from the tunnel to the tank." [KPC] at 344 (FOF #19.a).

ROA V.2 at 174-175. Based upon this finding of fact, the Circuit Court held:

> 73. If Kauai Springs bore the burden of proof that its proposed use did "not violate any applicable law administered by CWRM, the PUC or any other applicable regulatory agency," Kauai Springs plainly carried that burden of proof. Both of these agencies had provided their input to the Planning Commission, and neither agency had any substantial concerns with Kauai Springs, as reflected in the Decision and Order. [KPC] at 346 (COL #3).
>
> 74. There was no evidence presented at the public hearings, and no findings made by the Planning Commission that Kauai Springs did not carry any of its burdens to show it was entitled to the three permits at issue in this appeal, and the Planning Commission was clearly erroneous when it determined that Kauai Springs did not meet the burden on the zoning permit applications. Haw. Rev. Stat. § 91-14(g).
>
> 75. Conclusions of Law #3 and #4 . . . are wrong.

ROA V.2 at 189-190 (emphasis added). The Planning Commission's Conclusion of Law No. 4 states:

> 4. There is no substantive evidence that the Applicant has any legal standing and authority to extract and sell the water on a commercial basis.

KPC at 346. The Planning Commission raised and argued these issues at ROA V.2 at 94-97, 104-105.

E. The Circuit Court erred in concluding as matter of law that Appellee was properly integrated into the community of uses and met the requirements for the zoning permits at issue. In its September 17, 2008, Decision and Order, the Circuit Court held:

43. Kauai Springs is properly integrated into the community of uses. It had been operating without issue and with all the state and county permits necessary including two County building permits. The Planning Department staffer remarked about Kauai Springs, "[t]he existing water bottling facility is relatively low impact at the subject location in its current function and capacity." [KPC] at 607.

. . .

45. There is nothing in the Decision and Order or the Record to indicate that Kauai Springs' existing or proposed uses were not or will not be integrated.

. . .

59. The Decision and Order contains no finding, and there is no evidence in the Record, that Kauai Springs did not meet the criteria for issuing the three permits at issue in this appeal.

ROA V.2 at 184, 188; see also ROA V.2 at 185 ¶ 47, 187 ¶ 53. The Planning Commission raised and argued these issues at ROA V.2 at 93-105.

F. The Circuit Court erred in concluding as a matter of law that Appellee did not assent to extend the automatic approval deadlines for the Use Permit and Class IV Zoning Permit. In its September 17, 2008, Decision and Order, the Circuit Court held:

32. Kauai Springs appeared at the Planning Commission hearings on its permit application, but its presence and participation did not constitute a waiver of the deadlines to which the Planning Commission was obligated to adhere, and was not consent to or affirmation of an extension of time for the Planning Commission to act on the applications. See, e.g., October Twenty-Four, Inc. v. Planning and Zoning Comm'n, 646 A.2d 926, 931-32 (Conn. Ct. App. 1994).

. . .

36. Kauai Springs did not ask for extra time, nor did it withdraw its applications.

. . .

40. The failure to adhere to the time requirements was due solely to the actions of the Planning Commission.

ROA V.2 at 183-184. The Planning Commission raised and argued this issue at ROA V.2 at 105-108 and at the hearing before the Circuit Court. See Transcript at 23:7-15.

## IV. STANDARD OF REVIEW

It is well settled that "[i]n an appeal from a circuit court's review of an administrative decision, the appellate court will utilize identical standards applied by the circuit court." Hoopai v. Civil Serv. Comm'n, 106 Hawai'i 205, 214, 103 P.3d 365, 374 (2004) (quoting Price v. Zoning Bd. of Appeals, 77 Hawai'i 168, 171, 883 P.2d 629, 632 (1994) (citations omitted)).

Thus, the Court must determine whether the Circuit Court was right or wrong in its application of HRS § 91-14(g), which sets forth the standards of review applying to an agency decision. Curtis v. Board of Appeals, 90 Hawai`i 394, 392, 978 P.2d 822, 830 (1999). Such review, however, is qualified by the principle that the agency's decision carries a "presumption of validity." Id.; In re Wai`ola O Moloka`i, 103 Hawai`i 410, 420, 83 P.3d 664, 683 (2004) (same).

Section 91-14(g) (2004) states that,

> Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:
>
> (1) In violation of constitutional or statutory provisions; or
>
> (2) In excess of the statutory authority or jurisdiction of the agency; or
>
> (3) Made upon unlawful procedure; or
>
> (4) Affected by other error or law; or
>
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The "clearly erroneous" standard applies to the agency's findings of fact as well any conclusions of law presenting mixed questions of law and fact. Curtis, 90 Hawai`i at 393, 978 P.2d at 831 (citations omitted). An appellate court's review of mixed questions of law and fact "must give deference to the agency's expertise and experience in the particular field." Id. (citing Dole Hawaii Division-Castle & Cooke, Inc. v. Ramil, 71 Haw. 419, 424, 794 P.2d 1115, 1118 (1990) ("The court should not substitute its own judgment for that of the agency.")).

The agency's conclusions of law, on the other hand, are freely reviewable to determine if constitutional or statutory provisions were violated, statutory authority or jurisdiction were exceeded, or if the agency action was affected by other error of law. Id. Questions of constitutional law are reviewed de novo under the right or wrong standard and, thus, the court "exercises its own independent constitutional judgment based on the facts of the case." Hawai`i Gov't Employees Ass'n v. Casupang, 116 Hawai`i 73, 85, 170 P.3d 324, 335 (2007) (quoting State ex rel. Anzai v. City & County of Honolulu, 99 Hawai`i 508, 57 P.3d 433, 440 (2002)).

In cases such as this, involving an agency's duties under the public trust doctrine, the

presumption of validity imposes a heavier burden on the party challenging the agency's decision. In re Wai`ola O Moloka`i, Inc., 103 Hawai`i 401, 421, 82 P.3d 664, 684 (2004) ("[T]he special public interest in trust resources demand that this court observe certain qualifications of its standard of review.").

## V. ARGUMENT

### A. The Circuit Court Erred in Implicitly Holding in its Conclusions of Law that the Planning Commission had No Duty Under the Public Trust Doctrine to Consider Appellee's Bottling and Commercialization of Fresh Water.

The Circuit Court erred in implicitly holding that the Planning Commission had no duty under the public trust doctrine to consider Appellee's commercial use of ground-water resources. The September 17, 2008, Decision and Order, alluded to "any duty under the public trust that [the Planning Commission] *may* have had." ROA V.2 at 189 ¶ 71 (emphasis added). The indefiniteness of the Circuit Court's conclusion regarding this duty belies a central issue for the Court to resolve: whether a county agency has an affirmative duty under the public trust doctrine to ensure the legality of commercial water use when no other agency asserts regulatory jurisdiction. Under Hawai`i law, it is clear that the Planning Commission *does* have such a duty.

"The State has an obligation to protect, control and regulate the use of Hawai`i's water resources for the benefit of its people." Haw. Const. art. XI, § 7. This constitutional mandate derives from a broader principle known as the "public trust doctrine." Under this doctrine, the Planning Commission could not disregard Appellee's commercial use of the fresh water taken from Kahili Mountain.

Although Hawai`i specifically adopted the common-law public trust doctrine in 1899,[5] a comparable ideal prevailed over water rights at the time of the Great Mahele. Reppun v. Board of Water Supply, 65 Haw. 531, 545, 656 P.2d 57, 67 (1982) ("The springs of water and running water, . . . shall be free to all . . . ." (quoting Laws of 1850, at 202)). During the plantation era, however, the ideal of the public trust in fresh water was compromised—leading some private landowners to claim absolute ownership of fresh-water sources.[6] See Robinson v. Ariyoshi, 441

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[5] See King v. Oahu Railroad & Land Co., 11 Haw. 717, 725 (1899) (embracing the common-law doctrine) (citing Illinois Central R.R. Co. v. Illinois, 146 U.S. 387, 453 (1892)).

[6] "Post-Māhele water rights decisions ignored [the public trust] duty, treating public water resources as a commodity reducible to absolute private ownership, such that 'no limitation

F. Supp. 559, 563 (D. Haw. 1977) (describing "settled" water rights law in Hawai`i before 1972). Lingering beliefs and attitudes from this bygone era lie at the heart of this appeal.

In 1973, the Hawai`i Supreme Court overturned decades of privatization of fresh water when it held that "ownership of water in natural watercourses, streams and rivers remained in the people of Hawaii for their common good." McBryde Sugar Co. v. Robinson, 54 Haw. 174, 187, 504 P.2d 1330, 1339 (1973). Five years later, the people of Hawai`i elevated the public trust doctrine to the level of a constitutional mandate. In re Water Use Permit Applications, 94 Hawai`i 97, 132, 9 P.3d 409, 444 (2000) (hereinafter "Waiahole I"). Article XI, section 1 states:

> For the benefit of present and future generations, the State *and its political subdivisions* shall conserve and protect . . . all natural resources, including . . . water, . . . and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.
>
> All public natural resources are *held in trust by the State for the benefit of the people.*

Haw. Const. art. XI, § 1 (emphasis added). This provision embraces both the common-law and Hawaiian principles that *all* State waters are held in trust for the benefit of its citizens. Kelly v. 1250 Oceanside Partners, 111 Hawai`i 205, 222, 140 P.3d 985, 1002 (2006).

Although the State Constitution empowers a single agency to oversee water policy in Hawai`i, this does not exempt other agencies from duties to preserve and protect fresh waters subject to the public trust. Article XI, section 7 directs the legislature to create a water resources agency to set policies, define uses, and protect surface and ground-water resources while assuring appurtenant, correlative and riparian rights. Haw. Const. art. XI, § 7. In 1987, the legislature enacted the State Water Code (Ch. 174C, HRS) thereby creating the CWRM. In doing so the legislature engrafted the public trust doctrine wholesale into Chapter 174C, but did not intend to abolish the common-law doctrine in Hawai`i. Waiahole I, 90 Hawai`i at 131, 9 P.3d at 443.

> The Code and its implementing agency, the [CWRM], do not override the public trust doctrine or render it superfluous. Even with the enactment and any future development of the Code, the doctrine continues to inform the Code's

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. . . existed or was supposed to exist to [the owner's] power to use the . . . waters as he saw fit . . . .'" In re Water Use Permit Applications, 94 Hawai`i 97, 139, 9 P.3d 409, 451 (2000) (quoting Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co., 15 Haw. 675, 680 (1904)) (brackets omitted); see also Reppun, 65 Haw. at 539-48, 656 P.2d at 63-69.

> interpretation, define its permissible "outer limits," and justify its existence. *To this end . . . we hold that the Code does not supplant the protections of the public trust doctrine.*

Id. at 133, 9 P.3d at 445 (emphasis added).

The effect of this bifurcation is that when the CWRM declines to assert jurisdiction over waters subject to the public trust, other state agencies retain their common-law duty to protect, control and regulate the use of these water resources. Thus, water rights in areas outside of water management areas[7] are governed by the common law. Waiahole I, 94 Hawai`i at 179, 9 P.3d at 491 (citing Ko`olau Agric. Co., Ltd. v. Comm'n on Water Res. Mgmt., 83 Hawa`i 484, 491, 927 P.2d 1367, 1374 (1996)). Because the island of Kaua`i has not been designated as a ground-water management area, KPC at 411, responsibility for upholding the public trust remains with other public agencies—including the Planning Commission.

The Circuit Court based its conclusion, in part, on finding that the Planning Commission "was aware of the nature of Kauai Springs' operation and facility" in 2003, when it granted a Building Permit and Class IV Zoning Permit. ROA V.2 at 168 ¶¶ 6-8, 188 ¶ 58. However, in 2003 the role of County agencies as enforcers of the public trust doctrine was still unclear. That changed in 2006 after the Hawai`i Supreme Court decided Kelly v. 1250 Oceanside Partners. In that case the Court unequivocally held that "the plain language of article XI, section 1 mandates that the County does have an obligation to conserve and protect the [S]tate's natural resources." 111 Hawai`i at 225, 140 P.3d at 1004.

During the hearings process, the Planning Commission became aware that the Kelly decision redefined its duties with respect to the public trust and, specifically, Appellee's operations. KPC at 230-232. Thus, the Circuit Court's suggestion that the Planning Commission arbitrarily applied the public trust doctrine is without merit. In fact, the Planning Commission carefully deliberated the scope of its duties and the impact of its decision before rendering that decision. KPC at 183-185.

The Planning Commission could not disregard or implicitly endorse Appellee's commercial use of ground-water resources while still fulfilling its public trust duties. Waiahole

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[7] The CWRM "[s]hall designate water management areas for regulation under [the Water Code] where the commission, after the research and investigations . . . shall consult with the appropriate county council and county water agency, and after public hearing and published

I, 94 Hawai`i at 132 n.29, 9 P.3d at 444 n.29 (public trust imposes a duty to regulate and protect). The same standard should have applied to the Circuit Court's review of the Planning Commission's decision. Kootenai Envtl. Alliance v. Panhandle Yacht Club, 671 P.2d 1085, 1092 (Idaho 1983) (A reviewing "court will take a 'close look' at the action to determine if it complies with the public trust doctrine and it will not act merely as a rubber stamp . . . .").

In Kelly, the Hawai`i Supreme Court reiterated that the public trust doctrine necessarily limits the creation of private interests in fresh water held in trust by the State of Hawai`i. 111 Hawai`i at 222, 140 P.3d at 1002 ("[T]he king's reservation . . . necessarily limited the creation of certain private interests in waters." (quoting Robinson v. Ariyoshi, 65 Haw. 641, 674 n.31, 658 P.2d 287, 310 n.31 (1982))); see also Illinois Central R.R. Co. v. Illinois, 146 U.S. 387, 454 (1892) ("The State can no more abdicate its trust over property in which the whole people are interested, . . . so as to leave them entirely under the use and control of private parties, . . . than it can abdicate its police powers in the administration of government and the preservation of the peace."); In re Wai`ola O Moloka`i, Inc., 103 Hawai`i 401, 422, 83 P.3d 664, 685 (2004) ("Just as private trustees are judicially accountable to their beneficiaries for dispositions of the res, so the legislature and executive branches are judicially accountable for the dispositions of the public trust." (citation omitted)); McBryde Sugar Co. v. Robinson, 54 Haw. 174, 187, 504 P.2d 1330, 1339 (1973) ("Thus by the Mahele and subsequent Land Commission Award and issuance of Royal Patent right to water was not intended to be, could not be, and was not transferred to the awardee, and the ownership of water in natural watercourses, streams and rivers remained in the people of Hawaii for their common good."); Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 723 (Cal. 1983) ("[The] continuing power of the state as administrator of the public trust . . . extends to the revocation of previously granted rights or to the enforcement of the trust against lands long thought free of the trust."); Kootenai Envtl., 671 P.2d at 1091 ("[P]ublic trust resources may only be alienated or impaired through open and visible actions, where the public is in fact informed of the proposed action and has substantial opportunity to respond to the proposed action before a final decision is made thereon.").

The Circuit Court should have concluded that the Planning Commission, as a political subdivision, had a duty to examine the legality of Appellee's water use. Regardless of CWRM's

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notice, finds that the water resources of the areas are being threatened by existing or proposed withdrawals of water[.]" HRS § 174C-5(2) (2006).

assertion or nonassertion of jurisdiction, the Planning Commission retained a common-law duty to regulate and protect the public's interest in water subject to the public trust. Moreover, the bottling and commercialization of the Kahili Mountain ground-water affects resources subject to the public trust.

### B. The Circuit Court Erred in Concluding that Appellee's Use of Water Taken From a Ground-Water Source in Kaua`i Does Not Affect Resources Subject to the Public Trust.

The Circuit Court erred in ruling that "the Record in this case is devoid of any evidence that Kauai Springs[']' existing or proposed uses might affect water resources subject to the public trust." ROA V.2 at 188 ¶ 63.

The Hawai`i Supreme Court has repeatedly and unequivocally held that the public trust doctrine "'applies to *all* water resources without exception or distinction[,]' . . . and 'unlimited by any surface-ground distinction.'" In re Contested Case Hearing on the Water Use Permit Application Filed by Kukui, 116 Hawai`i 481, 491, 174 P.3d 320, 330 (2007) (emphasis added) (quoting Waiahole I, 94 Hawai`i at 133, 135, 9 P.3d at 445, 447); see also Kelly, 111 Hawai`i at 222, 140 P.3d at 1002 ("water resources," under article XI, "includ[e] ground water, surface water, and all other water." (citation omitted)).

The fact that Knudsen Trust owns the cave from which the water percolates,[8] or that Grove Farm owns the pipeline transporting the water to Appellee's facility, does not deprive the Hawaiian people of their interest in the fresh water itself. See, e.g., Parks v. Cooper, 676 N.W.2d 823, 838 (S.D. 2004) (holding that while a lake bed might be private land the water in the lake is subject to the public trust). "[A]part from any private rights that may exist in water, 'there is, as there always has been, a superior public interest in this natural bounty.'" Waiahole I, 94 Hawai`i at 134 n.31, 9 P.3d at 446 n.31 (quoting Robinson v. Ariyoshi, 65 Haw. 641, 677, 658 P.2d 287, 312 (1982)). "Although its purpose has evolved over time, *the public trust has never been understood to safeguard rights of exclusive use for private commercial gain.* Such an interpretation, indeed, eviscerates the trust's basic purpose of reserving the resource for use and access by the general public without preference or restriction." Id. at 138, 9 P.3d at 450 (emphasis added).

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[8] See KPC at 450-451 ("Inside the tunnel, water enters the system through a water pipe installed at or below the water surface.").

Domestic water use, particularly drinking, is recognized in Hawai`i as among the most important resources inhering to the public trust.[9] Waiahole I, 94 Hawai`i at 137, 9 P.3d at 449. Moreover, "[t]he continuing authority of the state over its water resources precludes any grant or assertion of vested rights to use water to the detriment of public trust purposes." Id. at 141, 9 P.3d at 453. Instead, there is "a presumption in favor of public use, access, and enjoyment" of fresh water resources, such that "the burden ultimately lies with those seeking or approving such uses to justify them in light of the purposes protected by the trust." Id. at 142, 9 P.3d at 454. Hence, the Planning Commission could not overlook Appellee's use of water and Appellee was required to show that commercializing the fresh-water resources at issue was legal and non-detrimental to public interests.

In this case Appellee sought after-the-fact permits to greatly increase its industrial bottling and commercialization of drinking water taken from a ground-water source. When queried about the rights of Appellee, Grove Farm, and Knudsen Trust to the water at issue, Appellee admitted that in over three years it never investigated the matter. KPC at 134-135. Therefore, the administrative record contained ample evidence demonstrating that Appellee's existing or proposed use might affect resources subject to the public trust, and that the issue of water rights was never properly resolved.

### C. The Circuit Court Erred in Implicitly Holding in its Conclusions of Law that the Planning Commission, by Requiring Appellee to Prove the Legality of its Commercialization of Fresh-Water Resources, Failed to Consider the Proper Criteria for Zoning Permits.

The Circuit Court erred in concluding that the Planning Commission did not consider the proper criteria when reviewing and processing Appellee's application. ROA V.2 at 184 ¶ 41. Implicit in this conclusion is the assumption that Appellee was only bound by the specific requirements for the Use, Special, and Class IV Zoning Permits, and was not required to prove the legality of its commercialization of fresh-water resources taken from Kahili Mountain.[10]

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[9] "In granting individuals fee simple title to land in the Kuleana Act, the kingdom expressly guaranteed: 'The people shall . . . have a right to drinking water, and running water . . . .' Enactment of Further Principles of 1850 § 7, Laws of 1850 at 202 (codified at HRS § 7-1 (1993))."). Waiahole I, 94 Hawai`i at 137, 9 P.3d at 449.

[10] On one hand, the Circuit Court concluded that "*If Kauai Springs bore the burden of proof that its proposed use did 'not violate any applicable law administered by CWRM, the PUC or any other applicable regulatory agency*,' Kauai Springs plainly carried that burden of proof."

ROA V.2 at 190 ¶ 75. In effect, the Circuit Court's conclusion requires the Planning Commission to ignore the commercialization and possible export of water from Kaua`i—in total disregard of any duties it might have to protect waters subject to the public trust.

As an initial matter, it cannot be refuted that Appellee bore the burden for satisfying both the specific permitting requirements under the CZO, and any applicable requirements relating to its use of fresh-water resources. Under the rules governing the Planning Commission, "the party initiating Commission consideration shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion." Rules of Practice and Procedures of the Planning Commission ("RPP") § 1-6-17(b) (1987). When water resources subject to the public trust are involved, "the burden ultimately lies with those seeking or approving such uses to justify them in light of the purposes protected by the trust." Waiahole I, 94 Hawai`i at 142, 9 P.3d at 454. Therefore, the Planning Commission had the burden to inquire and Appellee had the burden to respond with concrete evidence. Moreover, the public trust doctrine "effectively prescribes a 'higher level of scrutiny' for private commercial uses . . . ." Wai`ola O Moloka`i, 103 Hawai`i at 429, 83 P.3d at 692 (quoting Waiahole I, 94 Hawai`i at 142, 9 P.3d at 454).

The Planning Commission did not act arbitrarily or capriciously by scrutinizing Appellee's water use and ultimately denying land-use permits based on the issue of water rights. The Commissioners struggled to reconcile their statutory duty to administer land-use with their constitutional and common-law duty to protect Hawai`i's water resources under threat of commercial exploitation. KPC at 183-185. In the absence of regulation by the agencies specifically charged with protecting Hawai`i's water resources, the Planning Commission properly exercised its discretion and required "evidence that [Appellee had] . . . legal standing and authority to extract and sell the water on a commercial basis." KPC at 346 ¶ 4.

This Court should uphold the agency's decision and reverse the Circuit Court's conclusion that the Planning Commission exceeded and abused its discretion by considering

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ROA V.2 at 190 ¶ 73 (emphasis added). On the other hand, the Circuit Court concluded that the Planning Commission's "Conclusions of Law #3 and #4 are wrong." ROA V.2 at 190 ¶ 75. The Planning Commission's Conclusion of Law #3 states that: "The Applicant, as a party to this proceeding should also carry the burden of proof that the proposed use and sale of the water does not violate any applicable law administered by CWRM, and PUC or any other applicable regulatory agency." Thus, from the Circuit Court's Conclusions of Law it is unclear whether the Circuit Court held that Appellee did or did not bear any special burden pursuant to the public trust doctrine.

water rights as a criterion for granting or denying the zoning permits at issue. See ROA V.2 at 190 ¶ 75, 191 ¶ 3. Under Hawai`i law, the public trust doctrine empowers a county agency to deny land-use permits if granting such permits jeopardizes fresh-water resources held in trust.

> Mere compliance by [agencies] with their legislative authority is not sufficient to determine if their actions comport with the requirements of the public trust doctrine. The public trust doctrine at all times forms the outer boundaries of permissible government action with respect to public trust resources.

Waiahole I, 94 Hawai`i at 133, 9 P.3d at 445 (quoting Kootenai Envtl. Alliance v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1095 (Idaho 1983)). Consistent with this jurisprudence, the Court of Appeals may hold that a county agency evaluating land-use permits can demand assurances that related water use is both legal and non-offensive to the public trust, when granting the land-use permits directly or indirectly threatens otherwise unregulated water resources.

By upholding the Planning Commission's decision, the Court of Appeals need not "transform every state and county agency into a water rights tribunal merely because a connection can be made between a permit application and the public's water resources." See ROA V.2 at 120. Instead, the Court may limit the reach of its holding to regions not designated as water-management areas and, therefore, not generally subject to regulation by CWRM. On the other hand, affirming the Circuit Court's decision would effectively require the Planning Commission, and other political subdivisions, to ignore their duties "to protect, control, and regulate the use of Hawai`i's water resources for the benefit of its people." Therefore, the Court should hold that the Circuit Court erred in concluding that the Planning Commission did not consider the proper criteria when reviewing and processing Appellee's application.

### D. The Circuit Court Erred in Concluding that Appellee Carried its Burden of Proof by Presenting Sufficient Evidence that Its Proposed Use of Fresh-Water Resources was Legal Under Hawai`i Law.

The Circuit Court erred in concluding that Appellee satisfied its burden of proof that its proposed use did not violate any applicable law administered by CWRM, the PUC or any other applicable regulatory agency. ROA V.2 at 189-190 ¶ 73. Appellee was required to present concrete evidence that it possessed a legal right to bottle and sell water taken from the cave owned by Knudsen Trust, and that the proposed use was not inimical to the purposes of the

public trust. Waiahole I, 94 Hawai`i at 142, 9 P.3d at 454 ("[T]he burden ultimately lies with those seeking or approving such uses to justify in light of the purposes protected by the trust[.]"). Neither the evidence presented by Appellee nor the feedback received from CWRM and PUC satisfied this burden of proof.

As part of its application, Appellee provided the Planning Commission with a supplemental document attempting to explain how its bottling and commercialization of water met the requirements for the three zoning permits. KPC at 657-661. The document is silent on the issue of water rights and provides only conclusory assertions regarding the impact of Appellee's proposed increase in water use on the interests of other users, the general public, and the environment. See, e.g., KPC at 660 ¶ 4 ("This natural recourse [sic] is currently spilling over the existing chlorination system at a rate of approximately 150GPD. It is Kauai Springs[']' whole hearted desire to capture, sustain, apply stewardship, and harvest this water for the sole purpose of bringing it to the people of Kauai."). Although Appellee was well-aware that industrial bottling and commercialization of Kaua`i's fresh-water resources was "new and uncharted ground" and invoked a "dimly lit regulated area," it became apparent at the public hearings that it failed to conduct a reasonable investigation to ascertain the legality of its water use. KPC at 134-135, 661 ¶ 5.

The Planning Commission was justifiably concerned about that lack of tangible evidence regarding Appellee's use of water resources. The gravity fed system serves fifty to sixty customers, including Appellee. KPC at 415. Appellee sought a fourteen-fold increase in use of water from the ground-water source. KPC at 241-242. Appellee claimed there was no limit on the amount of water it could extract from the source, and evinced an intention to export its water from Kaua`i—possibly in smaller bottles amenable to international shipping. KPC at 241, 251. Therefore, the Planning Commission sought input and advice from numerous State and local agencies—including CWRM and PUC.

The Circuit Court erred by mischaracterizing the import of the correspondence between the Planning Commission and the CWRM. In a letter dated September 26, 2006, CWRM declined to exert jurisdiction over Appellee because Kaua`i was not designated as a ground-water management area, but also warned that Appellee's use of water could affect stream flows requiring an instream flow permit. KPC at 411 ¶ 8; see HRS § 174C-71 (1988). The Planning

Commission was unsure from this response whether Appellee, or CRWM itself, was responsible for determining necessity and compliance with the instream flow requirements. KPC at 225-226.

On November 6, 2006, the Planning Director responded to CWRM with a letter seeking clarification of the conditions under which Appellee would *not* be required to obtain a permit from CWRM. One of the three conditions stated that "The tunnel is not being changed, and *the Applicant's use of the water is not affecting the source in any way (i.e., not inducing more water to come out of the source or tunnel)*." KPC at 408 (emphasis added). The letter requested CWRM to "advise if you concur with the foregoing [conditions], and *if pursuant to those conditions, no permit is required from the [CWRM]*." KPC at 409 (emphasis added). CWRM responded by agreeing with the conditions, but the letter did not address whether those conditions were satisfied and failed to conclude that no permits were required.

> We concur with your summary of our comments and confirm that no permits from the Commission are required for the proposed use of water *under the three conditions outlined in your letter*.

KPC at 407 (emphasis added). Consequently, the Planning Commission's January 23, 2007, Decision and Order acknowledged that no permits from CWRM were necessary only if the three conditions were satisfied *but left unanswered whether the conditions were actually satisfied.* KPC at 344-345 ¶ 19.

The Circuit Court clearly erred in finding that the Planning Commission's January 23, 2007, Decision and Order acknowledged that the three conditions were satisfied and that no permits were required from CWRM. Finding of Fact #54 misconstrues the Planning Commission's findings by substituting the word "because" in place of the word "if"—thereby treating the three "conditions" as if they were "conclusions."

> 54. The Decision and Order stated the Water Commission informed the Planning Commission that Kauai Springs required "no permits" *because* "the Applicant's use of the water is not affecting the source in any way (i.e., not inducing more water to come out of the source or tunnel)," "the existing source has been registered and is basically grandfathered, and there is an agreement between the new user (Applicant) and he operator of the system," and "there is a closed line from the tunnel to the tank." [KPC] at 344 (FOF #19.a).

ROA V.2 at 174-175 (emphasis added). In fact, the Planning Commission never concluded that the conditions were satisfied or that no outstanding regulatory processes with CWRM remained vis-a-vis Appellee's application. KPC at 345, 346 ¶ 3.

Lack of concrete evidence pertaining to Appellee's relationship with Grove Farm and Knudsen Trust similarly clouded the Planning Commission's correspondence with the PUC. The Planning Director asked the PUC to determine "whether the Grove Farm water system or the Applicant's sale of water from the system is subject to regulation by [PUC]." KPC at 459. The PUC responded that "it does not *appear* that Kauai Springs would be a public utility subject to commission jurisdiction[,]" but warned that this opinion was informal and non-binding, limited by the facts provided, and subject to change based on evolving law in Hawai`i. KPC at 418 (emphasis added). The letter also stated that "*[b]ased on the . . . limited information provided*, there is a possibility that Grove Farm may be operating as a public utility" subject to regulation depending on "the amount of control, if any, [Appellee] may be able to exert over Grove Farm's water system and operations." KPC at 417 (emphasis added).

Based on the equivocal responses from both agencies, the Planning Commission found that "there may be outstanding regulatory processes with CWRM that Applicant must satisfy[,]" and "PUC . . . encourages that a declaratory ruling be sought to allow more diligent review of the relevant facts and information associated with the proposed water bottling facility." KPC at 345-346. The Circuit Court's conclusion that "[b]oth of these agencies had provided their input to the Planning Commission, and neither agency had any substantial concerns" is erroneous. ROA V.2 at 189-190 ¶ 73. Because Appellee provided insufficient information, the agencies were unable to draw reasonable conclusions. The Circuit Court also erred by shifting the burden from Appellee to present evidence of its compliance with the law to the Planning Commission to present evidence of Appellee's non-compliance with the law.

> 74. *There was no evidence presented* at the public hearings, and no findings made by the Planning Commission *that Kauai Springs did not carry any of its burdens* to show it was entitled to the three permits at issue in this appeal, and the Planning Commission was clearly erroneous when it determined that Kauai Springs did not meet the burden on the zoning permit applications. Haw. Rev. Stat. § 91-14(g).

ROA V.2 at 190 ¶ 74 (emphasis added). It is clear that "the party initiating Commission consideration shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion." RPP § 1-6-17(b); see also Waiahole I, 94 Hawai`i at 142, 9 P.3d at 454 ("the burden ultimately lies with those seeking or approving such uses to justify them in light of the purposes protected by the trust").

### E. The Circuit Court Erred in Concluding that Appellee was Properly Integrated into the Community of Uses and Met the Criteria that the Planning Commission was Required To Consider.

The Circuit Court erred in concluding that "[t]here is nothing in the Decision and Order or the Record to indicate that Kauai Springs' existing or proposed uses *were not or will not* be integrated." ROA V.2 at 184 ¶ 45 (emphasis added). The governing ordinances and statutes relating to the requested Use Permit, Special Permit, and Class IV Zoning Permit required *Appellee* to present evidence that its existing and proposed uses *were* integrated into the community of uses. RPP § 1-6-17(b). Moreover, Appellee's burden to demonstrate the integration of its proposed land-use was not mutually exclusive from its burden to demonstrate the legality of its proposed water-use.

The guidelines for granting the Use Permit, for example, required Appellee to prove that its proposed increase in water use would not detrimentally affect the general welfare of its neighbors and the community, and would not result in harmful environmental consequences to other land or water resources.

> A Use Permit may be granted only if the Planning Commission finds that the establishment, maintenance, or operation of the . . . *activity or use* in the particular case is a compatible use and *is not detrimental to* . . . [the] *general welfare of persons residing or working in the neighborhood or to the general welfare of the community, and will not cause any substantial harmful environmental consequences . . . on other* lands or *waters* . . . .

KCC § 8-20.5(a) (emphasis added); KPC at 343 ¶ 16.

Applying the plain language of section 8-20.5(a) to Appellee's proposed use of fresh-water resources was perfectly consistent with the Planning Commission's "obligation to protect, control and regulate the use of Hawai`i's water resources for the benefit of its people." Haw. Const. art. XI, § 7. If the proposed "activity or use" of land ultimately endangers resources subject to the public trust, then it follows that such "activity or use" of land is "detrimental to the general welfare of the community" and not properly integrated under the CZO.

The Planning Commission complied with the standards under section 8-20.5(a) by inquiring into, for example: (1) the effects of the proposed increase in water usage on the capacity of the ground-water source, KPC at 221, 241-242, 263; (2) whether discharge of chlorinated water from Appellee's operation might cause environmental harm to neighboring streams, KPC at 210-212; (3) Appellee's right to commercialize and distribute waters subject to

the public trust, KPC at 134-135; and (4) whether Appellee complied with CWRM and PUC regulations meant to protect water resources, KPC at 344 ¶ 18, 346 ¶ 3. Because Appellee failed to satisfy its burden of proof that its proposed use of fresh-water resources was legal under Hawai'i law, see supra Section D, the Planning Commission properly denied the Use Permit. KPC at 346 ¶¶ 3 & 4.

A Class IV Zoning Permit was necessary because Appellee was required to obtain a Use Permit. KCC § 8-7.7(4). Issuance of the Class IV Permit was conditioned upon the Planning Commission's finding that the proposed use of water resources conformed with the requirements of the CZO—and specifically the standards for a Use Permit under section 8-20.5(a).

> The Planning Director or his designee shall check the application to determine whether the . . . activity, [or] use . . . conforms to the standards established by [the CZO] . . . .

Id. § 8-19.6(b). As before, Appellee was required to present tangible evidence that its proposed water use was non-detrimental to the general welfare of its neighbors and the general public, and would not result in harmful environmental consequences to other water resources. Because Appellee failed to satisfy its burden of proof that its proposed use of fresh-water resources was legal under Hawai'i law, the Planning Commission properly denied the Class IV Zoning Permit. KPC at 346 ¶¶ 3 & 4.

Evidence demonstrating how the proposed increase in water use would impact other users, and potentially affect the municipal water supply, was relevant to granting or denying the Special Permit. The Guidelines for Issuance of Special Permit state:

> The Planning Commission *shall* consider the following guidelines in determining unusual and reasonable use:
>
> . . .
>
> (2) *The desired use would not adversely affect surrounding property*;
>
> (3) *The use would not unreasonably burden public agencies to provide . . . water[.]*

RPP § 13-6(a) (as amended June 14, 2000) (emphasis added).

The supplement accompanying Appellee's application, however, lacked any substantive evidence concerning either water rights or possible impacts that the proposed increase in water usage would have on the ground-water source or neighboring users' access to the water. KPC at 658 ¶¶ 3 & 5. Instead, the supplement makes conclusory statements about compliance with the permit requirements, and inappropriately focuses on the quality of the water and its availability

in the event of natural disasters. KPC at 659, 661 ¶ 6. When the Planning Commission queried Appellee and Knudsen Trust for specific information about the volume of water percolating from the ground-water source, it received only inconsistent and unsubstantiated responses. KPC at 221, 263. Therefore, contrary to the Circuit Court's conclusion, there was insufficient evidence in the administrative record to indicate that Appellee's existing or proposed uses were or would be integrated. Cf. ROA V.2 at 184 ¶ 45.

The Circuit Court also erred in concluding that "[t]he Decision and Order contains no finding, and there is no evidence in the Record, that [Appellee] did not meet the criteria for issuing the three permits at issue . . . ." ROA V.2 at 188 ¶ 59. The Planning Commission properly denied all three permits because "[t]here was no substantive evidence that the Applicant [had] any legal standing and authority to extract and sell the water on a commercial basis." KPC at 346 ¶ 4. As explained in Section C, supra, the proper criteria for granting or denying Appellee's land-use permits included whether Appellee's use of fresh-water resources was legal under public trust principles. Waiahole I, 94 Hawai'i at 133, 9 P.3d at 445 ("The public trust doctrine at all times forms the outer boundaries of permissible government action with respect to public trust resources.").

Therefore, the Circuit Court erred in concluding that Appellee was properly integrated into the community of uses and met the criteria that the Planning Commission was required to consider.

### F. The Circuit Court Erred in Concluding that Appellee did not Assent to Extend the Automatic-Approval Deadlines for the Use Permit and Class IV Zoning Permit.

The Circuit Court erred in concluding that Appellee did not assent to extend the automatic-approval deadlines for the Use Permit and Class IV Zoning Permit, and that the "failure to adhere to the time requirements was due solely to the actions of the Planning Commission." ROA V.2 at 183-184 ¶¶ 32, 40. By its conduct, Appellee led the Planning Commission to reasonably believe that Appellee assented to a delay in the final decision on these permits.

The CZO plainly permits applicants to "assent" to delays in the approval process. For example, the relevant automatic-approval provision for a Use Permit specifically allows the applicant to push back the deadline.

> If the Planning Director or the Planning Commission fails to take action within the time limits prescribed in this Article, *unless the applicant assents to a delay*, the application shall be deemed approved.

KCC § 8.19.5(g) (emphasis added); see also id. § 8-20.6 (Use Permit procedure follows deadlines for Class III Zoning Permit). An identical provision applies to the required Class IV Zoning Permit. Id. § 8-19.6(e).[11]

Although the word "assent" is not defined by the CZO, "we may resort to legal or other well accepted dictionaries as one way to determine the ordinary meaning of certain terms not statutorily defined." Leslie v. Bd. of Appeals of the County of Hawai`i, 109 Hawai`i 384, 393, 126 P.3d 1071, 1080 (2006) (quoting Schefke v. Reliable Collection Agency, Ltd., 96 Hawai`i 408, 424, 32 P.3d 52, 68 (2001)). "Assent" is defined as "verbal or nonverbal conduct *reasonably interpreted* as willingness." Black's Law Dictionary 124 (8th ed. 2004) (emphasis added). Its forms include:

> apparent assent, which is "given by language or conduct that *while not necessarily intended to express willingness*, would be understood by a reasonable person to be so intended and is actually so understood[;]"
>
> constructive assent, which is "imputed to someone based on conduct[;]" and
>
> implied assent, which is "inferred from one's conduct rather than from direct expression."

Id. Thus, the Court's appraisal of whether Appellee assented to a delay of the automatic-approval deadline may consider whether Appellee's words or conduct were *understood by the Planning Commission* to manifest Appellee's willingness to postpone final decision.

A number of actions by Appellee led the Planning Commission to believe that Appellee had assented to an extension of the automatic-approval deadlines for the Use and Class IV Zoning Permits. For example, Appellee and its counsel attended and were fully engaged in deliberations and negotiations throughout the five public hearings. During this period, which lasted from August 8, 2006, until February 13, 2007, neither Appellee nor its counsel asserted that the deadlines for the issuance of the permits were set to expire, or had expired. The deadlines for the Use and Class IV Zoning Permits—assuming that Appellee's application was

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[11] The force of these assent provisions should carry even more weight in light of the Legislature's recent declaration that automatic approval is "poor public policy" and "can lead to negative consequences for the community." See 2006 Haw. Sess. L. Act 280, § 1.

actually "complete" on July 5, 2006[12]—expired on October 18 and November 2, 2006, respectively.

Nevertheless, at the November 28, 2006, hearing—weeks after the purported deadlines expired—Appellee's attorney continued to negotiate for the granting of a conditional Use Permit.

> Chair (Randall Nishimura): Yes. I would ask in light of public comment whether you would be willing to accept the restriction on the Use Permit that it would be for the use of the applicant only, it's not transferable and that should you sell the business that the Commission would have the right to review the Use Permit?
>
> Mr. Cohen: Yes

KPC at 175. Mr. Cohen's willingness to negotiate for a conditional Use Permit more than five weeks after the purported deadline could only be construed by the Planning Commission as a willingness on the part of Appellee to delay a final decision on the matter.

On November 14, 2006—more than one week after both purported deadlines had expired—Appellee sought to amend its original application and request a water usage of 7,000 gallons per week instead of 35,000 gallons per week, and the use of two vans instead of ten. KPC at 197, 214, 438-439. This tactic, which was apparently intended to resolve continuing concerns over the application, was not accompanied by any claim that the permits were automatically approved.

Although the Use and Class IV Zoning Permits were supposedly already approved, at the January 23, 2007, hearing Appellee and its counsel argued vehemently against the proposed January 23, 2007, Decision and Order denying all three permits. KPC at 67-69, 72. At the February 13, 2007, hearing Appellee's attorney offered to accept conditional permits and asked for another continuance in order to obtain more evidence pertaining to the issue of water rights.

> Again we were willing to put all sorts of conditions and I know you have a long docket ahead of you. What we would like is for you to vote to reconsider and

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[12] "The County of Kaua`i Planning Commission and Planning Department have always considered an application to be 'complete' when all information regarding the proposed project has been received." Koloa Marketplace, LLC v. County of Kauai, Civ. No. 06-00570, 2007 U.S. Dist. LEXIS 56274, at *21 (D. Hawai`i July 31, 2007). In this case all of the information relevant to the Planning Commission's decision was not received until November 22, 2006, when the Planning Commission finally received feedback from the PUC. Cf. id. at *22 ("[A] trier of fact could find that the Application was not complete . . . since well after [the date of receipt of the application] the Planning Director was still in the process of gathering information as contemplated by [the CZO].").

> then continue this matter to a time in the not to distant future when we can all get our arms around any of the remaining issues . . . .
>
> . . .
>
> I don't see any downside in continuing this matter until we are certain and you gentlemen are certain that he is indeed operating outside the limits of the law.

KPC at 2-3. These representations were further evidence leading the Planning Commission to believe that Appellee assented to a delay of the automatic-approval deadlines. See Frito-Lay, Inc. v. Planning & Zoning Comm'n, 538 A.2d 1039, 1044-45 (Conn. 1998) (time deadlines can be waived by affirmative conduct such as requesting extra time).

The Planning Commission was justified in believing that Appellee's offers to revise its application, accept a conditional Use Permit, and continue the hearings weeks and months after the automatic-approval deadlines expired constituted an agreement to delay final resolution of the matter. In the recent case of Southeastern Chester County Refuse Authority (SECCRA) v. Board of Supervisors of London Grove Township, the applicant also did not expressly agree to an extension but nevertheless continued to actively participate long after the expiration of the automatic-approval deadline. 954 A.2d 732 (Pa. Cmwlth. 2008). The Commonwealth Court of Pennsylvania held that "[s]uch active participation, which goes well beyond mere attendance, is inconsistent with an intention to stand on the right to a deemed approval and constitutes an implicit, on-the-record agreement to continue with the hearing process . . . ." Id. at 738. The court explained that, like an agreement to contract, an waiver agreement may occur by means other than verbal statements.

> [A]n agreement may be evidenced by manifestations or circumstances created by the parties other than verbal statements. Waiver of a known contractual right, for example, "may be established by a party's express declaration or by a party's undisputed acts or language so inconsistent with a purpose to stand on the contract provisions as to leave no opportunity for a reasonable inference to the contrary."

Id. at 737 (quoting RCN Telecom Svcs. of Phila. v. Newton Township, 848 A.2d 1108, 1113 (Pa. Cmwlth. 2004)); see also In re Appeal of Grace Building Co., 395 A.2d 1049, 1051 n.2 (Pa. Cmwlth. 1979) (holding that continued participation in a land-use hearing process, after the right to a deemed approval arises, waives that right).

The United States District Court for the District of Hawai`i recently considered facts similar to those here and held that it was reasonable to conclude that the applicant assented to a delay in the automatic-approval deadlines. The court explained that,

> it is undisputed that [the applicant] did not raise the deemed approved issue with the County until September 19, 2006, nearly seven months after it contends its Application was deemed approved. *[The applicant] continued to actively participate in the permit process and attend the public hearings. [The applicant] continued to provide information and revise its plans in response to the Planning Department's concerns. [The applicant] was also aware of, and agreed to, continuances of the public hearing. [The applicant's] conduct, from the time it filed its Application through September 2006, may be viewed as inconsistent with the position that its Application had been deemed approved by operation of [the CZO].*

Koloa Marketplace, LLC v. County of Kauai, Civ. No. 06-00570, 2007 U.S. Dist. LEXIS 56274, at *23-24 (D. Hawai`i July 31, 2007) (emphasis added).

Accordingly, this Court should reverse the Circuit Court's Order deeming the Use and the Class IV Zoning Permits in this case automatically approved because the Planning Commission was justified in believing that Appellee assented to a delay in the final outcome.

## VI. CONCLUSION

For the foregoing reasons, the Planning Commission respectfully requests this Court to reverse the Circuit Court's September 17, 2008, Decision and Order and remand the case back to the Planning Commission with instructions to: (1) seek a declaratory ruling from the CWRM as to whether Appellee's commercial use of fresh-water resources taken from Kahili Mountain is legal and non-detrimental to the public trust; (2) seek a declaratory ruling from the PUC as to whether Grove Farm is operating as a public utility relative to the water system and clarify Appellee's control, if any, over the water system; and (3) permit Appellee to continue its business during the pendency of these determinations.

DATED: Honolulu, Hawai`i, DEC 23 2009

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